INTERIOR BOARD OF INDIAN APPEALS

Virginia Cross v. Acting Portland Area Director, Bureau of Indian Affairs

23 IBIA 149 (01/11/1993)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

VIRGINIA CROSS
v.
ACTING PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-168-A Decided January 11, 1993

Appeal from a decision declining to take land in trust for the benefit of an individual Indian.

Referred to the Assistant Secretary - Indian Affairs.

1. Indians: Lands: Trust Acquisitions

   Under 25 CFR 151.3(b), land in unrestricted fee status may be acquired in trust for individual Indians only if it is located within the exterior boundaries of an Indian reservation or adjacent thereto.

2. Indians: Lands: Trust Acquisitions

   While 25 U.S.C. § 465 (1988) vests broad discretion in the Secretary of the Interior to acquire land in trust for Indians, the Secretary has imposed limitations on his discretion by promulgating the regulations in 25 CFR Part 151.

3. Indians: Lands: Trust Acquisitions--Words and Phrases

   "Adjacent." Where the term "adjacent" is used but not defined in the regulations governing trust acquisitions of land for Indians, the Board of Indian Appeals declines to impose an interpretation upon the Bureau of Indian Affairs but, instead, refers to the Assistant Secretary - Indian Affairs an appeal in which the meaning of the term is at issue.

APPEARANCES: Robert L. Otsea, Jr., Esq., Auburn, Washington, for appellant; Stephen R. Shelton, Esq., Auburn, Washington, for the City of Auburn.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Virginia Cross challenges an April 22, 1992, decision of the Acting Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to take certain land in trust for her benefit. For the reasons discussed below, the Board refers this matter to the Assistant Secretary - Indian Affairs.

Background

Appellant is a member of the Muckleshoot Tribe. On September 24, 1991, she sought to have a lot she owns in unrestricted fee status taken into trust for her benefit. The lot is located in a residential subdivision of the City of Auburn, Washington. Appellant acknowledged in her request that the lot was not within the boundaries of the Muckleshoot Reservation. She stated that she was aware a waiver of the land acquisition regulations might therefore be required and requested that such a waiver be sought.

BIA solicited comments on the proposed acquisition from King County and the City of Auburn. King County did not object to the proposed acquisition. The City of Auburn, however, filed extensive objections. Appellant was given an opportunity to respond to the City's objections but did not do so.

[1] On April 22, 1992, the Area Director denied appellant's application, stating:

> Title 25 of the Code of Federal Regulations, Part 151.3(b)(1) states
>
> Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status when the land is located **within the exterior boundaries of an Indian reservation, or adjacent thereto**. [1/]
>
> Since the property is neither within the boundaries of the Muckleshoot Reservation, nor adjacent to the Reservation, the proposed acquisition would be in conflict with the regulations. We must therefore deny your application. Additionally, even if we did have authority to approve the transaction, we would not be able to do so because you indicate for the need to have the property acquired in trust that you "want to be assured that the property cannot be sold without a review and approval of the United States, and will be available and held for [your] grandson." We do not believe that the statement indicates a valid need to have the property placed in trust status.

(Area Director's Decision at 1-2; emphasis in original).

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1/ 25 CFR 151.3(b) provides in its entirety:

"Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status (1) when the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto; or (2) when the land in already in trust or restricted status."

Appellant's notice of appeal from this decision was received by the Board on May 28, 1992. Appellant and the City of Auburn filed briefs.

Discussion and Conclusions

In her notice of appeal to the Board, appellant contends: (1) 25 CFR 151.3(b)(1) conflicts with 25 U.S.C. § 465 (1988) 2/ in that the statute authorizes trust acquisitions of land "within or without existing reservations," (2) the Area Office failed to process her request for a waiver of the regulations, (3) the Area Office failed to analyze her request properly under the factors in 25 CFR 151.10, and (4) BIA violated its trust responsibility to her.

In her briefs before the Board, appellant argues that the Area Director erred in concluding that appellant's property is not adjacent to the reservation. She continues to argue that the Area Director did not properly consider the factors in 25 CFR 151.10.

[2] At the outset, the Board rejects appellant's contention that the regulation at 25 CFR 151.3(b)(1) conflicts with the statutory land acquisition authority in 25 U.S.C. § 465. It is true that the statute vests the Secretary with broad discretion to acquire land "within or without existing reservations." 3/ However, in the exercise of the discretion vested in him by the statute, the Secretary has promulgated regulations which place limitations on that discretion. This was clearly within his authority to do. Cf. Abbott v. Billings Area Director, 20 IBIA 268, 275 (1991) (The Secretary is bound by limitations he has imposed on his own discretion).

Appellant also contends, however, that her acquisition request comes within the scope of 25 CFR 151.3(b)(1) because, contrary to the Area Director's conclusion, her property is adjacent to the Muckleshoot Reservation. Appellant argues that "adjacent" means "near or close to" and that her property, which is approximately 1/2 mile from the reservation, falls within that definition.

In Maahs v. Acting Portland Area Director, 22 IBIA 294, 296 (1992), the Board observed:

> The term "adjacent," which is not defined in 25 CFR Part 151, is a term of flexible meaning, as reflected in the definition in

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2/ All further references to the United States Code are to the 1988 edition.

3/ 25 U.S.C. § 465 provides:

"The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations * * * for the purpose of providing land for Indians. * * * Title to any lands or rights acquired pursuant to [the Indian Reorganization Act] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

> Black's Law Dictionary (5th ed. 1979): "Lying near or close to; sometimes, contiguous; neighboring. Adjacent implies that the two objects are not widely separated, though they may not actually touch.

The property at issue in Maahs, according to the appellant in that case, was separated from the Tulalip Reservation only by a 30-foot-wide road. Because the administrative record did not show the exact location of the property vis-a-vis the reservation boundary, or include a discussion of the Area Director's reasons for finding that the property was not adjacent to the reservation, the Board remanded the case to the Area Director for further consideration. 4/

This case is distinguishable from Maahs in that the property at issue here is considerably further removed from the reservation. Thus it appears less likely here that appellant's property could be deemed "adjacent" to the reservation. Nevertheless, appellant has cited a case in which it was held that, for purposes of a particular Federal statute, i.e., 23 U.S.C. § 317, certain sites eight to ten miles away from a highway were adjacent to the highway. Southern Idaho Conference Ass'n of 7th Day Adventists v. United States, 418 F.2d 411, 416 (9th Cir. 1969).

[3] Neither 25 U.S.C. § 465 nor the regulations in Part 151 offer guidance as to what was intended by the term "adjacent" in section 151.3(b)(1). 5/ The Area Director stated in his decision that

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4/ Subsequent to the Board's remand, by memorandum dated Sept. 25, 1992, the Area Director sought policy guidance from the Deputy Commissioner of Indian Affairs concerning the interpretation of "adjacent" as it is used in section 151.3(b)(1). He also requested that the Deputy Commissioner make a decision concerning Maahs' application in light of an Apr. 20, 1990, memorandum issued by the Deputy to the Assistant Secretary - Indian Affairs (Operations), which required that all acquisition requests for lands not within the exterior boundaries of an Indian reservation be submitted to the BIA Central Office in Washington, D.C., for review.

5/ In July 1991, BIA published proposed amendments to Part 151, proposing to add new criteria for off-reservation trust acquisitions for tribes. A proposed revision of section 151.10 reads: "The Secretary shall consider the following criteria [i.e., the present criteria with one addition] in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation." (Proposed new language underscored.) The remainder of the proposal is devoted to additional criteria for trust acquisitions of tribal land outside of and noncontiguous to a reservation. No revision of section 151.3(b) is proposed. 56 FR 32278, 32279 (July 15, 1991).

Use of the term "contiguous" in the proposed revision of section 151.10 suggests that BIA might define "adjacent" in section 151.3(b)(1) to mean "contiguous." However, this is far from clear. The fact that the proposal makes no provision at all for criteria to govern off-reservation, noncontiguous acquisitions for individuals, even though such acquisitions are clearly possible under section 151.3(b)(2), makes it appear that section 151.3(b) was simply overlooked.

appellant's property was not adjacent to the reservation but, as in Maahs did not discuss that conclusion. Neither did the Area Director file a brief in this appeal.

In light of the discretionary nature of the trust acquisition authority, and the Board's limited review authority over BIA's exercise of that discretion (See, e.g., City of Eagle Butte v. Aberdeen Area Director, 17 IBIA 192, 96 I.D. 328 (1989)), the Board is reluctant to impose an interpretation of the term "adjacent" upon BIA. Accordingly, the Board finds that it is appropriate to refer this appeal to the Assistant Secretary - Indian Affairs under 43 CFR 4.337(b) in order to give him the initial opportunity to interpret the BIA regulation in this regard.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this matter is referred to the Assistant Secretary - Indian Affairs. 6/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

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fn. 5 (continued)

Under the circumstances, the Board finds that the language in the proposed regulations is not persuasive evidence of BIA's interpretation of the term "adjacent" in section 151.3(b)(1).

6/ The Board has not addressed appellant's arguments concerning the criteria in 25 CFR 151.10. In her notice of appeal to the Board, appellant expands upon the reason she gave in her application for needing to have land taken in trust. She states:

"[O]ne of the factors [in section 151.10] is the degree to which an individual Indian needs assistance in handling his or her affairs. I am not familiar with, nor understand, real estate law or the rules and regulations of the BIA. One reason that I gave in my fee to trust request was that I wanted to be assured that the property cannot be sold without review and approval of the United States. This way I can be sure that someone with knowledge of real estate makes sure issues of real estate law and rules and regulations are followed. This way the property is protected from loss." (Appellant's Notice of Appeal at 2).

If the Assistant Secretary concludes that appellant's property is "adjacent" to the Muckleshoot Reservation, within the meaning of section 151.3(b)(1) , he may wish to consider, or order the Area Director to consider on remand, appellant's further explanation of her need for assistance. Cf. Maahs, 22 IBIA at 196. The Assistant Secretary may also, of course, consider appellant's request for a waiver of the regulations, if he concludes that her property is not adjacent to the reservation.